PP

v.

MUHAMAD SUHAIMI ABDUL AZIZ

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
SITI NORMA YAAKOB FCJ
ALAUDDIN MOHD SHERIFF FCJ
[CRIMINAL APPEAL NO: 05-1-2004 (W)]
19 JANUARY 2005

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Acquittal of accused on ground of insanity by High Court - Affirmation of decision by Court of Appeal - Whether there was any fault with reasoning and conclusion of both courts*

This was an appeal by the learned senior deputy public prosecutor ('the DPP') against the decision of the Court of Appeal affirming, upon appeal by the prosecution, the trial judge's acquittal of the accused/respondent of the charge of murder on the ground of insanity under s. 84 of the Penal Code. The Court of Appeal found that the trial judge had taken into account the well-supported evidence of a medical expert stating that the respondent was insane at the material time of committing the criminal act, as against the other evidence before the court, before correctly concluding that the respondent had proven on a balance of probabilities that he was suffering from insanity at that material time.

The Court of Appeal, in response to a request from the DPP to order a retrial, was of the view that the fault lay wholly with the prosecution in failing to call medical evidence in rebuttal, and therefore, it was unfair to order the respondent to be retried and would tantamount to allowing the prosecution to have a second bite at the proverbial cherry. The Court of Appeal also referred to the other criticisms made by the DPP including the crucial finding of the trial judge that the respondent was not driven by any motive in killing his wife, the personal items recovered from the respondent, the glaring omission by both the prosecution and the defence to lead evidence on what happened to the respondent from the time he left the family home after the killing up to the time he was admitted to the Kemaman Hospital, and found no reason to disagree with the trial judge on all these considerations.

Held (dismissing the appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1] Before this court, the same issues were repeated and regurgitated by the DPP but after giving the utmost consideration to the matter, this court was unanimous in holding that, much as this court sympathised with the family of the victim, there was no fault with the reasoning and conclusion reached by both the High Court and the Court of Appeal. This court had, therefore, no other alternative but to dismiss the appeal and to confirm the orders made by the courts below. (p 838 c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh yang arif Timbalan Pendakwa Raya Kanan ('DPP') terhadap keputusan Mahkamah Rayuan yang mengesahkan, ekoran rayuan oleh pendakwaan, pembebasan tertuduh/responden oleh hakim bicara atas satu pertuduhan bunuh atas alasan hilang akal di bawah s. 84 Kanun Keseksaan. Mahkamah Rayuan mendapati bahawa hakim bicara telah mempertimbang keterangan pakar perubatan, yang disokong kuat, yang menyatakan bahawa responden telah hilang akal sewaktu beliau melakukan perbuatan jenayah, dan telah membandingkannya dengan keterangan-keterangan lain di hadapan mahkamah, sebelum merumuskan dengan betulnya bahawa responden telah membuktikan, atas imbangan kebarangkalian, bahawa beliau mengalami hilang akal pada waktu material.

Mahkamah Rayuan, dalam menangani permohonan DPP untuk perbicaraan semula, mengambil pendapat bahawa kesilapan adalah di pihak pendakwaan kerana gagal memanggil keterangan perubatan menangkis, dan oleh itu, adalah tidak adil untuk memerintahkan responden dibicarakan semula, kerana ianya bererti memberi peluang kedua kepada pendakwaan untuk membuktikan kesnya. Mahkamah Rayuan juga merujuk kepada kritikan-kritikan lain DPP – termasuk kritikan tentang rumusan penting yang arif hakim bahawa responden tidak dirangsang oleh sebarang motif apabila membunuh isterinya, tentang barangan peribadi responden yang diperolehi darinya, dan tentang kegagalan kedua-dua pendakwaan dan pembelaan untuk membangkitkan keterangan mengenai apa yang berlaku kepada responden sejak dia meninggalkan rumah keluarga selepas pembunuhan sehingga ke masa dia dimasukkan ke Hospital Kemaman – dan mendapati bahawa tiada alasan untuk tidak bersetuju dengan hakim bicara berkaitan perkara-perkara tersebut.

Diputuskan (menolak rayuan)
Oleh Abdul Malek Ahmad PCA menyampaikan penghakiman mahkamah:

[1] Di hadapan mahkamah ini, isu-isu yang sama telah diulangi dan dibahas semula oleh DPP. Bagaimanapun, setelah memberikan pertimbangan yang amat wajar kepada hal yang dibangkitkan, mahkamah ini sebulat suara berpendapat bahawa, walaupun mahkamah ini amat bersimpati dengan keluarga mangsa, tiada kesilapan telah dibuat oleh Mahkamah Tinggi mahupun Mahkamah Rayuan dalam mencapai keputusan dan alasan-alasan mereka. Dengan itu, mahkamah ini tidak mempunyai alternatif selain dari menolak rayuan dan mengesahkan perintah-perintah yang dibuat oleh mahkamah-mahkamah di bawah.*]*

Case(s) referred to:
Chua Hwa Soon Jimmy v. PP [1998] 2 SLR 22 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
PP v. Misbah Saat [1998] 1 CLJ 759 HC ***(refd)***
PP v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 147 HC ***(refd)***
R v. Turner [1975] 1 All ER 70 ***(refd)***
Regina v. Byrne [1960] 2 QB 396 ***(refd)***
Sek Kim Wah v. PP [1988] 1 MLJ 348 ***(refd)***
Sim Ah Song & Anor v. Rex [1951] 17 MLJ 150 ***(refd)***
Walton v. The Queen [1978] All ER 542 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Penal Code, s. 84

For the appellant - Mohd Yusof Hj Zainal Abiden SDPP
For the respondent - Alias Abdullah (Nik Mohd Radhia Nik Abd Ghani with him); M/s Alias Abdullah & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malek Ahmad PCA:
Saturday 25 September 1999 started off on a peaceful note for the respondent and his family at 40 Lorong Setiapuspa 1, Bukit Damansara, Kuala Lumpur. His wife Faizah had prepared breakfast before going to buy provisions with the maid and their younger son while the respondent and their other two children stayed home. On their return, the maid had assisted Faizah to prepare lunch which they had at about 1pm.

Thereafter, the respondent sat at the dining table while Faizah and their younger son watched television. Their other two children were playing in the hall. After cleaning up, the maid went to take a nap in the downstairs bedroom. This peaceful atmosphere abruptly ended at about 3pm when the couple's only daughter Sarah, in tears, woke the maid up to tell her that her parents were in the downstairs bathroom and to ask her to assist her mother. The maid promptly went to look. The bathroom door was ajar and the said respondent's back was towards her and the maid saw the respondent holding a knife facing Faizah.

The maid ran to the neighbour's house when five minutes later, she saw the respondent drive off in his silver car. Back in the house, she found the children crying and Faizah sprawled face downwards in the bathroom covered with blood with a blood stained knife on the floor near her right leg. She asked Sarah to call her grandmother in Kluang to tell her of the incident which Sarah did.

On receiving information, Inspector Koh Jok Tian rushed to the scene and found Faizah's body on the bathroom floor with the bloodstained knife near her right leg. Dr. Ong Beng Beng, a forensic pathologist, certified that Faizah was dead and later conducted a post mortem examination where he found her to have 26 stab wounds.

He found numerous defence wounds indicating Faizah had put up a struggle. The fatal injuries were the stab wounds to the chest which penetrated her lungs and caused massive haemorrhage. The stab wounds were consistent with that caused by the knife found near her body.

The respondent was subsequently charged with the murder of Faizah on 20 March 2000. He was then represented but on the adjourned hearing date on 26 June 2000, his counsel told the court that as the respondent's family was unable to pay his fees, he had been discharged and the respondent was engaging a new counsel.

On the next date on 5 July 2000, the new counsel, who is the present counsel, appeared and new hearing dates were fixed in October 2000. However, on 9 October 2000, learned counsel informed the court that his client wanted to make a second representation to the Attorney General to reduce the charge. He emphasized the fact of the tremendous impact the case would have on the respondent's children, who would be called as witnesses, apart from the effect it would have on their performance in their forthcoming examinations. Since the prosecution was not ready as the chemist was not available, the request for adjournment was granted.

On 6 November 2000, the learned deputy asked for new hearing dates to be fixed but learned counsel told the court that the high number of stab wounds on the victim showed that the respondent had run amok and the instructions given were that the incident was due to hallucination. When asked why the respondent did not complain to the doctors while in prison, the respondent remained silent.

On the next hearing date namely 6 December 2000, the question arose whether the respondent was fit to plead. He replied in the negative and when asked why, he gave no answer. The matter was adjourned to 18 January 2001, when the learned deputy intimated to the court that the respondent had made another representation to the Attorney General. On 2 February 2001, the learned deputy told the court that the Attorney General had decided that the charge be proceeded with but learned counsel produced the psychiatrist's report on the respondent whereupon the court adjourned the matter for the respondent to be remanded at the Hospital Bahagia in Ulu Kinta for observation for one month. On 15 March 2001, the learned deputy produced a letter from the hospital asking for another month to conclude their examination on the respondent. On 23 April 2001, the respondent was certified fit to plead and new hearing dates were fixed and the trial began on 4 August 2001.

After the prosecution witnesses had given evidence, the defence elected not to make any submissions and the learned trial judge, holding that a *prima facie* case had been made out, called upon the respondent to enter his defence. The respondent elected to give evidence on oath.

In his judgment, the learned trial judge said:

> The defence advanced was one of unsoundness of mind at the time of the commission of the crime. In his evidence the accused said that on 25 September 1999 he was in his house. He was seated at the dining table and was feeling very, very depressed. His mind was full of negative thoughts. He then said:
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> > I was smoking one cigarette after another trying to think what is going on in my thoughts. I was feeling negative about a lot of things. Then I heard voices talking to me directing me to do something to my wife. It was like taking over my mind. It was taking over control of me. I remember going to the bathroom and breaking down the door. Then I don't know what happened. I remember getting out of the house and getting into my car. That is all ...
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> In support of his defence the accused called as his witness one Dr. Rabaiah binti Mohd Salleh (DW2), a psychiatrist attached to the Hospital Bahagia, Ulu Kinta. Her basic medical degree is from Pakistan. She obtained her Masters degree in psychiatry from the Universiti Kebangsaan Malaysia and a Diploma in Forensic Psychiatry from the Institute of Psychiatry, University of London.

> She has been a consultant psychiatrist since 1994. She has examined many cases of mental illness and has given evidence in Court about 10 times. On 6 February 2001 the accused was referred to her.

In her evidence, the psychiatrist testified that she did a mental examination of the respondent which included frequent interviews, laboratory tests and a complete observation of the respondent's actions and mannerisms. She also interviewed the respondent's and his wife's families as well as their working colleagues. In addition, she held clinical group discussions with the hospital director and other psychiatric experts to get a second opinion.

At the end of it all, the diagnosis was that the respondent was suffering from a psychotic disease known as a delusional disorder of the jealous type. The other categories of delusional disorder, she added, was persecutory, grandiose, erotomanic and mixed types. The symptoms include auditory and visual hallucinations. The respondent's delusion was that his wife had been unfaithful. The psychiatrist's conclusion was that at the time of the incident, the respondent was of unsound mind and did not know that his action was wrong in law.

The learned trial judge went on to say:

> The defence then closed its case. The prosecution did not call any evidence in rebuttal. In his submission learned counsel for the accused said that the defence has succeeded in raising the defence of legal insanity. He referred to the case of *Yeo Ah Seng v. PP* [1967] 1 MLJ 231 and said that the absence of any motive on the part of the accused is an important indication of unsoundness of mind. In his reply the learned Deputy Public Prosecutor said that the prosecution had adduced sufficient evidence of the *actus reus*. With regard to *mens rea* he referred to the evidence of DW2 and left the matter to the Court.

He continued by stating:

> The accused said in his evidence that on the day in question he was feeling very depressed; his mind was full of negative thoughts; he heard voices directing him to do something to his wife; the voices were taking over control of him. He remembered going to the bathroom and breaking down the door. He also remembered getting out of the house and getting into his car. This is a significant piece of evidence in support of the defence advanced …
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> However, the accused was not cross-examined on this part of his evidence which is the basis of his defence. There is a general rule that failure to cross-examine a witness on a crucial part of his evidence will amount to an acceptance of the witness's testimony (see *Wong Swee Chin v. PP* [1981] 1 MLJ 20). The mental state of the accused as described by him must therefore be taken to have been accepted by the prosecution …

The cross-examination of DW2 was not directed towards a challenge of the results of her examination of the accused. As there was no serious challenge of the evidence of DW2 by the prosecution I myself subjected her to some questioning in order to determine whether her evidence could be accepted.

It is pertinent to highlight the portion of the notes in the trial where the psychiatrist was examined by the learned trial judge:

Court: Is it possible to ascertain a person's mental condition for a period about 1½ years prior to the examination?

A: I thank the Court for recognising our difficulty. We, the psychiatrists, get as much information as we can from as many sources as possible and that includes interviewing both sides of the family, interviewing their colleagues, getting detailed information from the police. We also obtained the autopsy report from the pathologist together with repeated questions of En Suhaimi to see the consistency of his information with the rest of the information we get from other sources. The group discussions that we had with the other psychiatrists includes all the psychiatrists interviewing En Suhaimi themselves at great length. That is the best we could do to arrive at our conclusion.

Court: Essentially your finding is based on your interviews?

A: It is the interview plus the intensive observation for three months. For observation we look at his behaviour, his sleep pattern and his emotions.

Court: Is it possible for you to distinguish a malingerer from a genuine one?

A: It is quite easy for a psychiatrist to identify a malingerer.

– In this case I am absolutely positive that En Muhd Suhaimi was not malingering.

Court: Can you explain why the accused explained the events of 25.9.99 to you when in Court today he said he does not know.

A: There is something special about therapist – patient relationship. Therefore as a summary of all my interviews I was able to get the necessary information. One needs psychiatric skills in asking such questions.

Before he concluded his judgment, the learned trial judge referred to the maid's evidence when he said:

She also said that the relationship between the accused and Faizah was good. Even though she had seen Faizah crying she did not know the reason for it. However, she had never seen the accused and Faizah quarrelling even on the day of the incident. No other evidence was led by the prosecution to cast any aspersions on the relationship between the two. Evidence of animosity between

the two, if any, could have been elicited from PW4 and PW7 which was not done. It must therefore be taken to mean, on the available evidence, that the relationship between the accused and Faizah was good. The evidence on record also shows that the atmosphere in the home of the accused up to about one hour prior to the incident was normal. In the circumstances I am compelled to conclude that the accused had absolutely no motive in killing Faizah indicating that his act was abnormal. In commenting on the absence of motive to an offence of murder Barakbah LP said in *Yeo Ah Seng v. PP* [1967] 1 MLJ 231 at p 233:

> Again, although motive is not an ingredient in the offence of murder, the jury's attention should have been drawn to the fact that lack of motive was an important indication of insanity …

In *Mst Shanti Devi v. State* AIR 1968 Delhi 177 it was held that generally in a case where the sanity of the accused is called in question motivation for the crime with which he is charged assumes unusual importance because if a serious crime like murder is committed by a man who had absolutely no rational motive to commit it the plea of unsoundness of mind can be more easily established than in other cases. The absence of any motive supports the unchallenged evidence of the accused that he was in a disturbed state of mind at the time of the incident as described by him. DW2 had said that the accused was of unsound mind at the time of the incident and that he did not know what he did was wrong in law. The doctor who examined the accused at the Kemaman Hospital on 27 September 1999 could have shed some light on the mental state of the accused at that time. However, he was not called to testify by the prosecution. Thus there was no other evidence with which I could have displaced the medical evidence advanced by the defence. On the contrary the nature and quality of the evidence tendered by the prosecution lent support to the defence of insanity.

The conclusion of the learned trial judge was:

> It follows that the evidence of DW2 being unchallenged with no other evidence to rebut the defence advanced a verdict contrary to the medical evidence would not be a true verdict in accordance with the evidence on record. In the upshot I held that the accused had successfully established the defence advanced on a balance of probabilities and, accordingly, I made the consequential orders.

As to the question of the defence of insanity, it is governed by s. 84 of the Penal Code which reads:

> 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

On this point, the learned trial judge said:

> It is settled law that where an accused person raises the defence of insanity the burden of proof will be on him (see *Juraimi bin Husin v. PP* [1998] 1 MLJ 537; *PP v. Ismail bin Ibrahim* [1998] 3 MLJ 243; *Jusoh v. PP* [1963] MLJ 84). The standard of proof to be discharged by the accused is on a balance of probabilities (see *Rajagopal v. PP* [1977] 1 MLJ 6; *PP v. Nageswari* [1994] 3 MLJ 463; *PP v. Jong Chin Chin* [1995] 4 MLJ 300). The burden may be discharged by the accused by adducing evidence as to his conduct at the material time or immediately afterwards and by evidence of his mental condition and other relevant facts. At the close of the case for the defence I had found that the defence had successfully established the defence of insanity on the balance of probabilities. Accordingly, I ordered that the accused be acquitted as he was insane at the material time and did not know that what he did was wrong in law though I was satisfied that the act was committed by him. I therefore ordered that he be kept in safe custody in Hospital Bahagia, Ulu Kinta pending an order from the Yang di-Pertuan Agong.

The Court of Appeal went through a number of authorities namely:

(a) *Pendakwa Raya v. Zainal Abidin bin Mohd. Zaid* [1993] 1 CLJ 147, which held that recording a plea of guilt by an accused certified to be of unsound mind should be treated as a mere irregularity which did not occasion any failure of justice;

(b) *Public Prosecutor v. Misbah bin Saat* [1998] 1 CLJ 759, where the mere fact that the court had cognizance of the medical report to indicate that at the time of the commission of the offence the accused was of unsound mind is irrelevant at the stage when the accused is certified fit to stand trial and he chooses to plead guilty;

(c) *Chua Hwa Soon Jimmy v. PP* [1998] 2 SLR 22, where it was held that the defence of diminished responsibility must be discharged by the defence on a balance of probabilities;

(d) *Regina v. Byrne* [1960] 2 QB 396, where it was held that whether the accused was suffering from abnormality of mind and whether the abnormality was such as substantially impaired his mental responsibility were matters for the jury on which they were entitled to disagree with the medical evidence, but the aetiology of the abnormality was a matter to be determined by expert evidence;

(e) *Walton v. The Queen* [1978] All ER 542, where the Privy Council held that the jury were bound to consider not only the medical evidence but the whole of the evidence as to the facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after the killing and any history of mental abnormality and that they were entitled to conclude that on a balance of probabilities, the plea of diminished responsibility had not been established;

(f) *Sek Kim Wah v. PP* [1988] 1 MLJ 348, where the court ruled that the verdict as to abnormality of mind is plainly a finding of fact which must be founded on all the evidence, including medical opinion and even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so;

(g) *R v. Turner* [1975] 1 All ER 70, where the Court of Appeal in England held that an expert opinion was only necessary where the expert could furnish the court with scientific information that was likely to be outside the experience and knowledge of the judge or jury and the psychiatrist's evidence was not necessary to tell them how an ordinary person who was not suffering from mental illness was likely to react to the stresses and strains of life and what reliance they could place on the evidence of someone who was not mentally disordered;

(h) *Sim Ah Song & Anor v. Rex* [1951] 17 MLJ 150, relating to expert evidence in a gambling case, it was held that where expert evidence is given to explain the nature of a document, the expert should explain its contents by explaining the technical and unintelligible terms contained in it and that the responsibility for the determination of every question upon which expert evidence is called, rested upon the court and not upon the expert;

(i) *Wong Swee Chin v. PP* [1981] 1 MLJ 212, where it was held that it was for the court to assess the evidence of the expert witness and there was no evidence to show that the trial judge had incorrectly or improperly evaluated the evidence; and

(j) *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153, where it was held that the opinion of expert witnesses was admissible in evidence and there was no requirement in law that such evidence be corroborated;

before stating as follows:

> The legal principle that may be distilled from the authorities is that the role of an expert witness is merely to assist the court in arriving at its decision. In the final analysis the court is the final arbiter and not the expert. As a necessary corollary in giving his opinion the expert needs to give his reasons. A bare statement of an expert would not suffice.
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> In the present case the learned Deputy contended that the learned Judge committed an error of law firstly, in failing to properly evaluate the evidence of the medical expert as against the other evidence before the court and secondly, the expert in this case in giving her opinion did not provide any reason to support it. This the learned Deputy contended is a serious deficiency in the testimony of the expert which the learned Judge failed to consider.
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> Before we proceed further we should remind ourselves of the position of the appellate court where the judgment under appeal is based on the findings of the facts by the trial judge. The right approach to be taken by the appellate court is as expressed by Edgar Joseph Jr. SCJ in *Yusoff bin Kassim v. PP* [1992] 2 MLJ 183 at 188:
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> > Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses, except where he has failed to observe the inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors. v. Lim Thean Tong*). An appellate court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. (See *Goghlan v. Cumberland and Bigsby v. Dickinson*).

After dealing with the prosecution's criticisms of the psychiatrist's evidence, the Court of Appeal said:

> Firstly, on the evidence of the expert, DW2, we do not think it is opened to the criticisms as urged upon us by the prosecution. From the evidence of DW2 it is clear that her medical finding on the accused was made after conducting the necessary observations and after conducting interviews not only on the accused but also with the members of his family, the deceased's family members and their friends. It is true that not all the observations and the contents of the interviews were put in evidence, but in the cross-examination DW2 did mention about the interviews which she conducted on the accused. …

> On the question put to her by the learned Judge, *viz*, whether her finding is essentially based on her interviews, she stated that it is the interviews plus intensive observation for three months. For observation, she told the court, they look at his behaviour, his sleep pattern and his emotions. It is, therefore, incorrect to say that there were no facts disclosed by DW2 in her evidence to support her finding. On the contrary, we find, there are ample materials before the court to support such a finding.

The Court of Appeal also referred to the other criticisms made by the learned deputy including that the trial judge did not consider evidence other than the medical evidence, the crucial finding of the trial judge that the respondent was not driven by any motive in killing his wife, the personal items recovered from the respondent, the glaring omission by both the prosecution and the defence to lead evidence on what happened to the respondent from the time he left the family home after the killing up to the time he was admitted to the Kemaman Hospital, and found no reason to disagree with the trial judge on all these considerations.

In conclusion, the Court of Appeal held:

> The learned Deputy contended that it is for the defence to explain to the court what had happened to the accused during this period. The absence of any explanation he contended cast a serious doubt on the defence case. It may be that the absence of such an explanation may cast some doubt on the defence case. But, the question is whether considering all the evidence available, the accused had successfully proved on the balance of probabilities that he was suffering from insanity at the material time. We agree with the learned trial judge that he has succeeded in doing so.
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> There is one other point. The learned Deputy had urged upon us that in the event the Court is not with him in this appeal then, in all fairness, this Court ought to order a retrial. With respect, we could not accede to the application of the learned Deputy for the following reasons. Under section 316 of the Criminal Procedure Code no doubt the appellate courts have a discretion, in appropriate cases, to order retrials. The issue is whether it is just in the circumstances of the present case for this Court to make such an order. For guidance we would refer to the observation of Lord Morrison CJ, in Rex v. Howe 2 M.C. 109, at pg. 110 which was cited with approval by Hashim Yeop A. Sani J (as he then was) in *Zahari bin Yeop Basri & Anor v. PP* [1980] 1 MLJ 160 which reads:
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> > I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.

> In the present case we are of the view that the fault lies wholly with the prosecution in failing to call medical evidence in rebuttal. Therefore, in the circumstances we think it is unjust to order the accused to be retried. To allow such an application would be tantamount to allowing the prosecution to have a second bite at the proverbial cherry.
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> For the above reasons the appeal by the prosecution is hereby dismissed and the order of the learned Judge is accordingly affirmed.

Before us, the same issues were repeated and regurgitated by the learned deputy but after giving our utmost consideration to the matter, we are unanimous in holding that, much as we sympathise with the family of the victim, we can find no fault with the reasoning and conclusion reached by both the High Court and the Court of Appeal.

We have, therefore, no other alternative but to dismiss the appeal and to confirm the orders made by the courts below.